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NM Environment Department
Office of the Secretary

May 31, 2016

Via e-mail (Kathryn.Roberts@state.nm.us) *and hand delivery*

Kathryn Roberts
Division Director
Resource Protection Division
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

Re: ***Santa Clara Pueblo's comments on the March 2016 draft Compliance Order on Consent for Los Alamos National Laboratory ("Revised Draft LANL Consent Order")***

Dear Ms. Roberts:

On behalf of Santa Clara Pueblo, I submit the following comments on the Revised Draft LANL Consent Order. As you review these comments, please bear in mind the deep connection Santa Clara Pueblo has to the Pajarito Plateau, a connection which pre-dates the existence of Los Alamos National Laboratory ("LANL") or even the Manhattan Project by quite a few centuries. The modern-day boundaries of Kha' Po Oweengeh, or Santa Clara Pueblo, include over 54,000 acres of land. That acreage includes some of our traditional lands that we have fought to regain, but does not include all of our aboriginal territory. The Pajarito Plateau contains many areas of importance to our people and any clean-up that is not protective of traditional uses of this profoundly holy place for us affects the cultural integrity and health of the Santa Clara Pueblo people for current and many future generations to come.

I very much appreciate meeting you and having the opportunity, along with leadership and representatives of Cochiti Pueblo and Jemez Pueblo, to be briefed about the Revised Draft LANL Consent Order by New Mexico Environment Department ("NMED") Secretary Flynn on May 24th. Having that direct dialogue and strengthening our government-to-government collaboration is important.

Please know that we, at Santa Clara Pueblo, do appreciate Secretary Flynn's desire to try to set up a different structure for the Revised Draft LANL Consent Order that has some flexibility in it in the hopes that it will be more effective for garnering results when dealing with new information or funding constraints, but we are deeply concerned that the new structure does not provide sufficient incentives for the Department of Energy ("DOE") to prioritize funding the clean-up of legacy (and continuing and more newly-discovered) wastes at LANL and negates the ability to have meaningful public input and meaningful government-to-government consultation about when and how remediation will occur.

As we understand it, it appears the Revised Draft LANL Consent Order would establish a clean-up "campaign" structure in which DOE could group together and determine how to prioritize like-minded or geographically close corrective action activities and projects. It appears that Appendix B would be used to list "milestones" for the various tasks in a given "campaign" but only for the next federal fiscal year and would set "targets" for a two-year period, and that such a listing of "milestones" and "targets" would be updated annually. Importantly, however, only missed annual "milestones" would trigger stipulated penalties against DOE by NMED.[1] "Targets" are unenforceable.

While it appears that the listing of the different "campaigns" in Appendix C contains a general estimate of years that may be needed to complete each given "campaign," unlike the previous Consent Order issued in 2005, there does not appear to be any overarching schedule for completing all of the LANL legacy waste clean-up work which could be enforced by NMED. The new structure of the Revised Draft LANL Consent Order appears to us to indefinitely extend the final compliance date for completing corrective action at LANL.[2] We understand the desire for setting achievable goals and having some flexibility to adjust the goals but that does not mean an overarching compliance timeline should be scrapped altogether, especially since the annual planning process for setting "milestones" appears to us to be subject to constant negotiation and re-negotiation (a true moving target in the traditional sense of that phrase, not as the term "target" is used in the Revised Draft LANL Consent Order).

Santa Clara Pueblo is very concerned that the Revised Draft LANL Consent Order appears to allow DOE to propose changes mid-year to the annual schedule of enforceable "milestones" if

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[1] Santa Clara Pueblo would be very interested in working with NMED to ensure that any penalties paid by DOE are used by the State to assist in on-the-ground remediation or restoration projects that would benefit the communities surrounding LANL, including the Pueblo. This topic was raised at the May 24th meeting and we would welcome a continued dialogue about it with Secretary Flynn.

[2] Given the lawsuits that led up to the previous Consent Order in 2005, Santa Clara Pueblo would like a written explanation detailing the New Mexico Attorney General's review of this dramatic change in the Revised Draft LANL Consent Order including an explanation of why, unlike the Consent Order in 2005, the Attorney General is not included as a signatory to the Revised Draft LANL Consent Order. As we understand it, the Consent Order is basically a settlement agreement of past lawsuits brought by the State and, in return for DOE making certain commitments, NMED will agree not to sue DOE. It is hard to understand why the Attorney General would not have to be involved in the settlement of lawsuits and in the making of covenants from the State not to sue.

DOE claims insufficient funding is available (or once a particular year's budget is set in a manner that cannot be changed). We understand NMED, as the regulator, making allowances for occurrences truly outside of DOE's control but we are quite concerned that clean-up at LANL will be held hostage to DOE's overall internal prioritization of its funding allocations from Congress. DOE simply does not have a proven track record of ensuring clean-up activity at LANL receives its fair share of overall DOE Environmental Management funding. Moreover, the point of having enforceable deadlines for clean-up with a long-term schedule is to help incentivize Congress to appropriate (and ensure DOE prioritizes) sufficient funding.[3] The Revised Draft LANL Consent Order appears to have only sort of enforceable deadlines that could change every year or even during the year, and the annual planning process does not appear to us to line up with the timeframes needed in Congress for appropriating longer-term "campaign" funding. This appears to be a fatal flaw that needs to be corrected.

It also concerns us deeply that the only item that could be subject to stipulated penalties -- namely, whatever one-year "milestone" is set forth in an annual plan -- could be changed or the timeframe for completion extended without any public or government-to-government input or review. Worse yet, unlike the previous Consent Order issued in 2005, it appears that any or all aspects of the Revised Draft LANL Consent Order, once adopted, could undergo further modifications without any public input or government-to-government consultation. This contravenes NMED's *Tribal Communication and Collaboration Policy* (Dec. 17, 2009)(*see, e.g.*, Section V.A) and our own historic, comprehensive *Memorandum of Agreement between the New Mexico Environment Department and Santa Clara Pueblo* (Dec. 20, 2010)(*see, e.g.*, Attachment B to the MOA, Sections A. 2 and 4). Santa Clara Pueblo requests that this be corrected as well.

In addition, we request that NMED revise some of its automatic consent clauses in the Revised Draft LANL Consent Order and add a phrase allowing NMED to demonstrate good cause for needing additional time. Emergencies can happen and we do not want the clean-up of LANL to be jeopardized because of a bureaucratic automatic consent clause in the document. One example where some sort of emergency out clause for NMED would be advisable is at page 54 of the Revised Draft LANL Consent Order wherein it states that "[i]f NMED action on a DOE submission is not completed in accordance with an agreed-upon review schedule, the submittal will be deemed approved." Another example can be found on page 64 wherein it describes that NMED has to respond within fifteen business days of receipt of a written request for an extension of a "milestone" in Appendix B and if NMED fails to do so, an automatic extension of time will be granted to DOE to complete a "milestone" that would otherwise have been subject to stipulated penalties if not achieved. Allowing automatic extensions of "milestones," in addition to extending milestones without any public input or review, is extremely ill-advised, and only

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[3] Full and proper remediation of LANL wastes is vitally important to Santa Clara Pueblo so I, as Governor, am very willing to do my part to assist NMED by lobbying Congress for sufficient DOE clean-up funding, but Congressional appropriations will be much more difficult to obtain without there being sufficient enforcement mechanisms in the Consent Order.

heightens our concern about the lack of meaningful enforcement mechanisms in this newly-structured version of the Consent Order.

Finally, it is important for the Revised Draft LANL Consent Order to be further revised to incorporate a more explicit process whereby government-to-government consultation will occur before approval of any screening levels and clean-up levels at a site. The document as currently drafted states at page 31 that the "DOE shall define the use of screening levels and cleanup levels at a site" and that DOE must use *NMED's Risk Assessment Guidance for Site Investigations and Remediation* (July 2015)("NMED Risk Guidance") to determine whether or not a site meets acceptable risk. The NMED Risk Guidance clearly allows for Tribal exposure scenarios to be factored into a site. *See* NMED Risk Guidance at 3 (""If other land uses and exposure scenarios are determined to be more appropriate for a site (e.g., home gardening, recreational land use, hunting, and/or Native American land use), the exposure pathways addressed in this document should be modified or augmented accordingly or a site-specific risk assessment should be conducted."). Yet, there doesn't appear to be any government-to-government consultation pathway in the Revised Draft LANL Consent Order to ensure that occurs. This needs to be corrected in the document. Furthermore, this request is in keeping with DOE Order 144.1 (http://energy.gov/em/downloads/doe-order-1441-department-energy-american-indian-tribal-government),which incorporates the DOE Indian Policy. This Policy recognizes the need to protect trust resources both in and outside of reservation boundaries (including aboriginal territories), affirms that DOE will promote cooperation with state agencies on matters affecting tribes, and seeks to "ensure integration of Indian Nations into decision-making processes."

Because the Revised Draft LANL Consent Order specifies at page 31 that "[t]he need for cleanup is triggered by potential unacceptable risk and not by exceedance of screening levels," it is essential that risks to the Pueblos surrounding LANL be calculated, or that there be an acknowledgment that, in the absence of Tribal exposure scenarios, a more protective (*i.e.*, conservative) screening level (such as 1E-7 and HI=0.1 or 0.01) should apply. It is appropriate to employ such a conservative assumption in the absence of a developed Tribal exposure scenario because the Pueblos' uses of the land and resources are far more intense than, for instance, a recreational user and therefore NMED's regular target risk levels should not necessarily be the default for every site-specific clean-up plan.[4] Given the frequency and intensity and breadth of uses of resources, and the deep connection that the Pueblos surrounding LANL have to that entire area, it is critically important that government-to-government consultation on clean-up levels and screening levels is made explicit in a new Consent Order and that proper timeframes for such consultation are factored into the document. Clean-up of the Pajarito Plateau to levels that are protective of the general public but are not protective of

[4] Santa Clara Pueblo is concerned because, for example, NMED has agreed to a default target risk screening level for individual carcinogens of 1 E-5 that is ten times less stringent than the Environmental Protection Agency uses for carcinogens. We also are concerned that the Revised Draft LANL Consent Order is unclear as to how cumulative exposures from multiple contaminants of concern at a site will be addressed. For instance, does the reference "lifetime excess cancer risk" apply to each contaminant or from a site as a whole?

traditional Pueblo uses would preclude Santa Clara Pueblo's safe use of the area. We ask that the document be corrected to incorporate our request so that NMED does not somehow inadvertently condone or unwittingly institutionalize that sort of potential racial discrimination into the document.

Santa Clara Pueblo respectfully requests that NMED issue a written response to all of our comments and concerns and that we have an opportunity to consult with NMED on that written response before a new Consent Order is finalized. We also believe the document should be further revised based upon the comments received and circulated again for public review and comment before it is finalized. Clean-up of legacy wastes at LANL is too important to rush into a completely new structure without real scrutiny and dialogue and consensus on a path forward. Personally, I look forward to having a continued dialogue with Secretary Flynn on these important issues.

Santa Clara Pueblo concludes these comments with a reminder that the area surrounding LANL has myriad cultural resources of great significance to Santa Clara Pueblo's continued traditions. It is therefore essential to the continuation of our way of life that as many of the lands as possible both at and near LANL are truly remediated and restored. Moreover, ensuring the highest levels of clean-up and accountability through a new Consent Order will benefit not only Santa Clara Pueblo but all future generations of New Mexicans.

Sincerely,

J. Michael Chavarria
Governor

cc via e-mail only:

Hon. Ryan Flynn, Secretary, NMED (via Ryan.Flynn@state.nm.us)
Members of the Santa Clara Pueblo Tribal Council
Dino Chavarria, Director, Santa Clara Pueblo Office of Environmental Affairs
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